DAVID E. HUGHES

IBLA 76-7 Decided September 23, 1976

Appeal from decision of the Nevada State Office, Bureau of Land Management, requiring consent to a special stipulation as a condition precedent to acceptance of sodium prospecting permit application N-9782.

Affirmed.

1. Administrative Authority: Generally -- Environmental Quality: Generally -- Mineral Lands: Prospecting Permits -- Sodium Leases and Permits: Permits -- Wildlife Refuges and Projects: Leases and Permits -- Withdrawals and Reservations: Generally

   The Bureau of Land Management may issue a sodium prospecting permit for lands adjacent to areas withdrawn for wildlife conservation purposes subject to a stipulation which provides that, in the event of discovery of an exploitable sodium deposit, no preference right lease will be issued unless hydrologic and other environmental analyses indicate that sodium ore can be removed without a significant adverse environmental impact on the wildlife habitat within the withdrawn areas.

APPEARANCES: David E. Hughes, pro se.

OPINION BY ADMINISTRATIVE JUDGE RITVO

David E. Hughes has appealed from a decision of the Nevada State Office, Bureau of Land Management (BLM), holding that his application for a sodium prospecting permit (N-9782) for lands adjacent to areas withdrawn for wildlife purposes would be granted provided he consented to the imposition of the following special stipulation:

> If the prospecting under this permit results in the discovery of a workable deposit of sodium and/or potassium, no preference right lease will be issued until and unless an environmental analysis and Environmental Impact Statement, if required in accordance with the National Environmental Policy Act of 1969, indicates that the ore can successfully be extracted without significant adverse environmental impact. One major consideration will be the effect of brine removal on the present water resources of the Stillwater National Wildlife Refuge, the Fallon National Wildlife Refuge, and the Stillwater Wildlife Management Area.

In his statement of reasons on appeal, appellant points out that the lands within his permit application are situated 10 miles from the nearest location of surface water within the wildlife areas, and thus it is unreasonable, when considering the topography of the area, to believe that future development activities will have a significant effect on the water resources within the wildlife areas. Appellant requests that the Board order BLM to delete the stipulation.

The BLM decision was based upon recommendations within the environmental analysis record (EAR) for sodium-potassium prospecting in the Carson Sink Area, Nevada. The Carson Sink is a playa which encompasses approximately 500 square miles of land. In the EAR, BLM described the Sink as having little in the way of potential use except for mineral leasing purposes. The land is essentially barren with no vegetative cover. Wildlife utilization, however, occurs within the Fallon National Wildlife Refuge, the Stillwater Wildlife Management Area, and the Stillwater National Wildlife Refuge, which occupy parts of the southwestern and southern portions of the Sink.

The United States Fish and Wildlife Service (FWS) had informed BLM that it was opposed to the issuance of permits for lands within or adjacent to the wildlife areas. The position taken by FWS was that benefits gained from the issuance of prospecting permits, and the possible issuance of preference right leases based upon such permits, were outweighed by the possible adverse impact upon waterfowl habitat that might accompany withdrawal of groundwater from areas near such habitat. In a memorandum from FWS to BLM dated March 25, 1975, FWS stated that so long as there was incomplete data available concerning the potential adverse effects that mineral leasing activity would have upon wildlife resources, it could not concur with any action favoring leasing, and added the following:

> We have previously questioned the effects of ground water displacement. For example we knew that brine removal at other locations has caused lowering of the water table 30 to 40 miles from the pumping site. * * *

FWS explained that this comment arose from a discussion of operations in the Bonneville Salt Flats, where it was reported that brine removal sometimes lowered the water table during the summer months so that pumping had to be discontinued until rains replenish the supply. It was not indicated that a permanent lowering of the water table was caused by the sodium operations.

The BLM believed that a blanket denial of all applications on the basis of the reasons presented by FWS was unreasonable and contrary to BLM policy to foster orderly development of federal mineral resources. However, BLM also recognized that the Department had an obligation to protect wildlife values. Accordingly, BLM concluded that it could satisfy both goals by employing the special stipulation, supra, for lands adjacent to the wildlife areas. Thereafter, BLM issued its decision providing for the granting of a prospecting permit subject to appellant accepting the special stipulation.

Pursuant to 30 U.S.C. § 261 (1970), the Secretary of the Interior is authorized, under such rules and regulations as he may prescribe, to grant to any qualified applicant a sodium prospecting permit. 43 CFR Part 23 provides regulations for the protection and conservation of nonmineral resources during operations for the discovery, development, surface mining, and onsite processing of minerals under permits, leases, or contracts issued pursuant to the Mineral Leasing Act, as amended, 30 U.S.C. §§ 181-287 (1970).

43 CFR 23.5(a) provides that BLM shall develop a technical examination to determine the effects of the proposed prospecting activities, taking into consideration the need for the "preservation and protection of other resources, including * * * the protection of fish and wildlife and their habitat * * *." Based upon the results of the technical examination, BLM may formulate requirements which the applicant must meet for the protection of nonmineral resources during the conduct of exploration or mining operations. 43 CFR 23.5(b).

43 CFR 23.5(d) provides that whenever it is determined that any part of the area under consideration is such that previous experience under similar conditions has shown that operations cannot feasibly be conducted by any known methods or measures to avoid "The destruction of key wildlife habitat * * * the district manager may prohibit or otherwise restrict operations on such part of an area."

43 CFR 23.8(a) and (b) provide that before surface mining operations may commence under any permit or lease, the operator must file a mining plan with the mining supervisor (USGS) which includes, in part, an estimate of the quantity of water to be used, and a description of measures to be taken to prevent damage to fish and wildlife.

[1] With these regulatory criteria in mind, we now turn to the case at hand. These regulations provide ample authority for the Secretary, or his delegate, to refuse to issue a permit if there is a reasonable basis for the belief that operations under the permit or lease may lead to the destruction of a key wildlife habitat. The issue here is whether this determination may be made after a permit has issued but before the subsequent lease is granted. The stipulation requires that, in the event of discovery of an exploitable deposit of sodium, a hydrologic study be performed to determine the effect of brine withdrawal on the water resources of the wildlife areas, and no preference right lease will be issued unless the hydrologic and environmental analyses indicate that the sodium ore can successfully be extracted without significant adverse environmental impact. As to the legitimacy of the stipulation, the Board stated in Stanford R. Mahoney, 12 IBLA 382 (1973), and J. D. Archer, 2 IBLA 303, 78 I.D. 189 (1971), that an applicant for a prospecting permit is properly required to agree to environmental stipulations as a condition precedent to the issuance of the permit where those stipulations conform to the Department's obligations under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. (1970). And in the Mahoney case, supra at 388, the Board specifically stated that:

> We perceive no reasons why the permit may not be granted subject to the express stipulation and understanding that the issuance of any lease pursuant thereto will be conditioned upon the prior rendition of an environmental [analysis] * * *, the findings of which shall determine whether and under what terms the lease may issue. Of course, if prospecting under the permit fails to disclose commercial deposits * * * no further environmental analysis need be undertaken.

As for the reasonableness of applying the stipulation in the circumstances of this case, we note the following. The pertinent regulations permit BLM to either prohibit or otherwise limit mineral leasing operations in order to protect wildlife resources. In the present case the technical examination report and the EAR indicated that prospecting activities within the Sink would not adversely affect groundwater resources but the Department was without sufficient information to determine whether damage would occur to the wildlife habitat in the event development activities were permitted. Rather than exercising its discretionary power to reject the prospecting permit applications based upon the existing

uncertainty respecting the impact of development activities, BLM chose instead to allow prospecting activity to go forward subject to the imposed stipulation. In the EAR, the following is stated:

> While only a few relatively low-magnitude impacts are identified under the exploration phase of the proposed program, this report has identified the potential for a severe adverse impact under the development/operational phases if a preference-right lease does issue. That potential adverse impact cannot be analyzed at this time because of lack of pertinent data.
>
> To further complicate the goals of this analysis, not all applicants have been willing or able to furnish details of their development/operational programs.

Given the present information void facing BLM, resulting in part from the failure of numerous applicants to provide relevant data pertaining to the anticipated effects of development activities, we find the proposed action of BLM to be reasonable. Furthermore, we do not find persuasive appellant's argument with respect to the 10-mile distance of his application site from the wildlife areas in light of past experience which has shown that ground water displacement may occur from as far as 30 to 40 miles from a pumping site. Accordingly, we hold that it was permissible in this instance for BLM to impose the special stipulation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed.

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Martin Ritvo
Administrative Judge

I concur:

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Joan B. Thompson
Administrative Judge

ADMINISTRATIVE JUDGE HENRIQUES CONCURRING SPECIALLY:

I agree with the opinion of Judge Ritvo that the Bureau of Land Management may require acceptance of the special stipulation which provides that even though a discovery of sodium is made under the prospecting permit, the preference right to a lease may not be exercised if development of the sodium operations will cause a severe adverse impact to the environment, including fish and wildlife in the adjacent area. Stanford R. Mahoney, 12 IBLA 382 (1973).

I wish to point out that during the pendency of this appeal, the Department has amended and revised the regulations in 43 CFR Subparts 3520 and 3521 governing the issuance of preference right leases to holders of sodium prospecting permits, inter alia. Circular 2390, 41 F.R. 18845, May 7, 1976. The regulations pertinent to sodium leases were revised or amended in the following ways:

> 3520.1-1(a): In addition to showing discovery of a valuable deposit of sodium, the permittee must also show that the land is chiefly valuable for the mineral deposit discovered.
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> 3520.1-1(c): A valuable deposit is defined as one in which the mineral deposit is of such a character and quantity that a prudent person could be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine. The permittee must present evidence to show that revenues from sale of minerals will exceed his costs of developing the mine and extracting, removing and marketing the mineral.
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> 3521.1-1(b)(3)(iv): requires a narrative statement, including, inter alia, the relationship between anticipated mining operations and the known habitat of fish and wildlife on the lands applied for or adjacent thereto.
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> 3521.1(i): provides that an application for a preference right sodium lease may be rejected if inadequate information is provided to support the discovery of a valuable mineral deposit and that the land is chiefly valuable for the sodium mineral deposit. In considering whether the land is "chiefly valuable"

> for sodium, the impact of the proposed operations on other land use resources and land management programs, including fish and wildlife, in the area must be considered.
>
> 3521.1-4: provides that prior to the issuance of a lease a technical examination and environmental analysis will be conducted which will include an evaluation of the impacts of mining operations on other land uses and resources, or land management programs on or adjacent to the area. It also requires the environmental analysis to include an analysis of the impact of the proposed mining operations set forth in the application.
>
> 3521.1-5(a): provides that whatever stringent requirements are necessary to obtain environmental performance standards may be imposed in the proposed lease. It follows that under certain circumstances a lease might not issue even though a deposit of sodium has been discovered.

The regulations themselves and the comments which accompanied their publication in the Federal Register make plain that the lease applicant must bear the costs of complying with stipulations and that if the cost of mining exceeds the value of the deposit the lease application will be denied. Minor revisions and responses to comments #12, 41 F.R. 18846 (1976).

One of the following general comments, id. #12, deals particularly with the Endangered Species Act. It stresses that the cost of complying with stipulations could result in a lease application not meeting the commercial quantities and valuable deposit tests. Such a lease application would then be denied.

With these new regulatory criteria in mind, I believe that acceptance of the stipulation under appeal is not required to achieve the purpose sought: the perpetuation of the environment amicable to fish and wildlife. The regulations clearly require that the land must be "chiefly valuable" for its sodium deposit before any lease may issue. If the sodium operations are shown to interfere or probably to interfere with the environment or any land use or land management programs, including those for fish and wildlife on adjacent lands, no lease may issue. The stipulation, however, does give an additional warning to the prospecting permit applicant that there is no assurance he may ever receive a sodium lease even though he finds a sodium deposit.

I point out further that the new regulations, in 43 CFR 3521.1-1(j), provide that if the application for a preference right lease is rejected, the permittee has a right to a hearing before an Administrative Law Judge of the Department if he has alleged in his application facts sufficient to show that he is entitled to a lease. At the hearing, the permittee shall have both the burden of going forward and the burden of proof that he has discovered a valuable deposit of sodium and that the land is chiefly valuable for the sodium, even considering all possible adverse effects upon the environment.

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Douglas E. Henriques
Administrative Judge